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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/767,355	01/23/2001	Stephen Philip Mann	GJE-13XC1D1C1	3294

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SALIWANCHIK LLOYD & SALIWANCHIK
A PROFESSIONAL ASSOCIATION
2421 N.W. 41ST STREET
SUITE A-1
GAINESVILLE, FL 326066669

EXAMINER

HENDRICKS, KEITH D

ART UNIT	PAPER NUMBER
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1761

13

DATE MAILED: 12/10/2002

Please find below and/or attached an Office communication concerning this application or proceeding.

TC-13

Office Action Summary

Application No.

09/767,355

Applicant(s)

MANN, STEPHEN PHILIP

Examiner

Keith Hendricks

Art Unit

1761

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133).
- Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 28 August 2002 and 26 September 2002.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 1-3 and 6-22 is/are pending in the application.
- 4a) Of the above claim(s) _____ is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) 1-3, 6-19 and 22 is/are rejected.
- 7) ☒ Claim(s) 20-21 is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on _____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
- Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
- 11) ☐ The proposed drawing correction filed on _____ is: a) ☐ approved b) ☐ disapproved by the Examiner.
- If approved, corrected drawings are required in reply to this Office action.
- 12) ☐ The oath or declaration is objected to by the Examiner.

Priority under 35 U.S.C. §§ 119 and 120

- 13) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
2. ☐ Certified copies of the priority documents have been received in Application No. _____.
3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).
- * See the attached detailed Office action for a list of the certified copies not received.
- 14) ☐ Acknowledgment is made of a claim for domestic priority under 35 U.S.C. § 119(e) (to a provisional application).
- a) ☐ The translation of the foreign language provisional application has been received.
- 15) ☐ Acknowledgment is made of a claim for domestic priority under 35 U.S.C. §§ 120 and/or 121.

Attachment(s)

- 1) ☐ Notice of References Cited (PTO-892)
- 2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
- 3) ☐ Information Disclosure Statement(s) (PTO-1449) Paper No(s) _____.
- 4) ☐ Interview Summary (PTO-413) Paper No(s). _____.
- 5) ☐ Notice of Informal Patent Application (PTO-152)
- 6) ☐ Other: _____.

DETAILED ACTION

Continued Examination Under 37 CFR 1.114

A request for continued examination under 37 CFR 1.114, including the fee set forth in 37 CFR 1.17(e), was filed in this application after final rejection. Since this application is eligible for continued examination under 37 CFR 1.114, and the fee set forth in 37 CFR 1.17(e) has been timely paid, the finality of the previous Office action has been withdrawn pursuant to 37 CFR 1.114. Applicant's submission filed on August 28, 2002, has been entered.

Claim Rejections - 35 USC § 112

The following is a quotation of the second paragraph of 35 U.S.C. 112:

The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.

Claims 14-22 are rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention.

In claim 14, the phrase "wherein said amount of organism increases animal feed efficiency" is indefinite. It is unclear as to how this relates to the claimed composition itself, in what manner the organism is to be administered, and how it is to increase the animal feed efficiency. Similarly, the phrases "is administered" (claim 16) and "per head per day" (claims 16-17) are indefinite. It is unclear to what object the solid feed composition "is administered".

Claim Rejections - 35 USC § 102

The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

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i) Claims 1, 3, 6, 8-11, 13-14, 16-17, 19 and 22 are rejected under 35 U.S.C. 102(b) as being anticipated by Lewandowski et al.

The reference and rejection are incorporated as cited at page 3 of the Office action mailed 12/21/01. Further, Lewandowski et al. disclose that *Lactobacillus kefir* is present in the composition being pretreated in amounts of 1.730×10^9 units per ml (col. 14, lines 15-21), which would be expected to meet the limitations of instant claims 10-11 and 16-17. Claim 19 of the reference specifically states that the resultant "edible biomass for animal feed" is a "solid biomass".

Thus, the instant claims are anticipated by the reference.

ii) Claims 1-3, 8-18 and 22 are rejected under 35 U.S.C. 102(b) as being anticipated by Cooke (Agricultural Research, 1995, of record).

Cooke discloses that various silage crops, such as corn, barley and alfalfa, which are "the mainstay feed for about 9.8 million U.S. dairy cows" (col. 1), contain strains of *Lactobacillus* bacteria. Four years prior to the publication of the reference, it is stated that a researcher "isolated a strain of *Lactobacillus buchneri* from one of these [spoilage] resistant silages" (col. 2). This provides evidence and demonstrates that, at least, *Lactobacillus buchneri* is naturally present in silage, which is available as a solid feedstuff "when the silos are opened for animal feeding" (col. 1). Although the natural amounts of the microorganisms in the feedstuff are not specifically stated by the reference, it would be expected that the ranges would fall within the broadly-recited levels of the instant claims, absent any clear and convincing evidence and/or arguments to the contrary.

Finally, it is noted that this rejection was not made under 35 U.S.C. 101, as a "product of nature", because the silage material is not naturally present in the silo, requiring human intervention. However, it is this act that provides the environment for the growth of these microorganisms and the fermentation of the silage, via natural processes stemming therefrom.

iii) Claims 1-3, 7, 10-11, and 14-18 are rejected under 35 U.S.C. 102(b) as being anticipated by Alifimtsev et al. (SU 1777772, 1992, of record).

Alifimtsev et al. disclose the feeding of chickens, by the addition of *Lactobacillus buchneri* to the feed or drinking water of the chickens. The amounts are in the range of 1×10^9 to 1.2×10^9 bacteria cells per head, and produce results of "increased weight gain [and] higher quality meat." Chicken feed is traditionally a solid feedstuff.

Double Patenting

The nonstatutory double patenting rejection is based on a judicially created doctrine grounded in public policy (a policy reflected in the statute) so as to prevent the unjustified or improper timewise extension of the "right to exclude" granted by a patent and to prevent possible harassment by multiple assignees. See *In re Goodman*, 11 F.3d 1046, 29 USPQ2d 2010 (Fed. Cir. 1993); *In re Longi*, 759 F.2d 887, 225 USPQ 645 (Fed. Cir. 1985); *In re Van Ornum*, 686 F.2d 937, 214 USPQ 761 (CCPA 1982); *In re Vogel*, 422 F.2d 438, 164 USPQ 619 (CCPA 1970); and, *In re Thorington*, 418 F.2d 528, 163 USPQ 644 (CCPA 1969).

A timely filed terminal disclaimer in compliance with 37 CFR 1.321(c) may be used to overcome an actual or provisional rejection based on a nonstatutory double patenting ground provided the conflicting application or patent is shown to be commonly owned with this application. See 37 CFR 1.130(b).

Effective January 1, 1994, a registered attorney or agent of record may sign a terminal disclaimer. A terminal disclaimer signed by the assignee must fully comply with 37 CFR 3.73(b).

Claims 1-3, 6-18 and 22 are rejected under the judicially created doctrine of obviousness-type double patenting as being unpatentable over claims 1-40 of U.S. Patent No. 6,326,037. Although the conflicting claims are not identical, they are not patentably distinct from each other because the patented claims are generally directed to a method for treating silage (grass, maize, crop cereals) with *Lactobacillus buchneri*, while the instant claims are directed to a feed composition, containing a feed material made of grasses, corn, crop cereals, etc. (claims 12 & 18), and a *Lactobacillus* bacteria including *Lactobacillus buchneri*. The treatment of the silage thus yields a composition of the same material, which is traditionally used in various food methods, including administration to animals.

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Conclusion

Claims 20 and 21 are free of the prior art of record. These claims are objected to as being dependent upon a rejected base claim, but would be allowable if rewritten in independent form including all of the limitations of the base claim and any intervening claims. There is no teaching or suggestion in the art to utilize either of strains *Lactobacillus parabuchneri* or *L. parakefir* within solid animal feedstuffs, as claimed. Further, there does not appear to be any evidence or teaching that such a feedstuff existed prior to the effective filing date of the instant application.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Keith Hendricks whose telephone number is (703) 308-2959. The examiner can normally be reached on M-F (8:30am-6pm); First Friday off.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Milton Cano can be reached on (703) 308-3959. The fax phone numbers for the organization where this application or proceeding is assigned are (703) 872-9310 for regular communications and (703) 872-9565 for After Final communications.

Any inquiry of a general nature or relating to the status of this application or proceeding should be directed to the receptionist whose telephone number is (703) 308-0661.



KEITH HENDRICKS
PRIMARY EXAMINER